

// FINANCIAL REGULATION

Preparing for Individual Accountability

PART 2 - Fitness and Probity Reforms

June 2022

INTRODUCTION

In the run-up to the Central Bank's expected Summer 2022 consultation on its proposed individual accountability framework, this is the second of a new series of client briefings on what steps firms should be taking now to prepare for the Central Bank's individual accountability framework which is expected to come into effect in early 2023.

Our recent briefing on actions that can be taken by firms to prepare for the conduct standards pillar of the Central Bank's individual accountability framework is available [here](#).

Our previous briefing on the heads of bill on individual accountability published in July 2021 is available [here](#).

In this briefing, we examine proposed fitness and probity reforms - one of the four pillars of the individual accountability framework - and we outline the actions that can be taken by firms and individuals to prepare for these fitness and probity reforms before they come into effect.

BACKGROUND

The fitness and probity regime is designed to ensure that individuals in key roles in the regulated financial services industry meet minimum standards of fitness (i.e. competence and capability) and probity (i.e. honesty, ethical behaviour, integrity and financial soundness).

The existing fitness and probity regime is grounded in the Central Bank Reform Act 2010 (as amended) (the **2010 Act**). The Central Bank has issued statutory codes under the 2010 Act, setting out minimum standards of fitness and probity for individuals performing controlled functions (**CFs**) and pre-approval controlled functions (**PCFs**) (the **F&P Standards**). The Central Bank has also published FAQ and guidance documents on fitness and probity to help regulated financial service providers (**RFSPs**) and individuals performing CF and PCF roles to comply with their respective fitness and probity obligations.

FITNESS AND PROBITY REFORMS

SCOPE AND ENFORCEMENT AGAINST RFSPS

The fitness and probity reforms pillar of the proposed individual accountability regime will apply to all RFSPs from when the individual accountability regime comes into effect, which is expected to be in early 2023.

Breaches of fitness and probity requirements will be enforceable against RFSPs through the Central Bank's Administrative Sanctions Procedure (**ASP**).

KEY REFORMS

1. Certification

Under the current fitness and probity regime a RFSP is required to satisfy itself on reasonable grounds that an individual meets the F&P Standards both at the time of their appointment to a CF or PCF role and on an ongoing basis while they continue to perform a CF or PCF role. Central Bank guidance on fitness and probity in its recent Dear CEO letters (our briefings on which is available [here](#)) has emphasised the ongoing nature of the obligation of RFSPs regarding fitness and probity.

Under the enhanced fitness and probity regime an RFSP will be obliged not to allow a person to perform a CF or PCF role unless the RFSP has itself certified in writing that it is satisfied that the individual meets the F&P Standards. This new requirement for periodic, positive certification of the fitness and probity of all individuals in CF or PCF roles constitutes a significant new regulatory obligation on RFSPs which must ensure that they always have a reasonable evidence base for making any such certifications.

Legislation will empower the Central Bank to make regulations setting out certification requirements including:

- requiring RFSPs to adopt fitness and probity policies and procedures to ensure that persons in CFs and PCFs meet the F&P Standards;
- requiring RFSPs to carry out specific due diligence checks on persons in CF and PCF roles;
- specifying formal requirements of the certification regime, including the period of validity of the certification; and
- specifying requirements for firms in relation to the reporting of information to the Central Bank.

2. Investigation

Under the enhanced fitness and probity regime, the Central Bank will be empowered to investigate the fitness and probity of individuals who previously performed CF and PCF roles but no longer do so at the time the investigation is launched, where it suspects the individual poses a danger to consumers or to the financial system.

Whilst legislation will provide for a maximum period between when an individual last performed a CF or PCF role and the launch of an investigation into that individual's fitness and probity, exceptions will apply where the Central Bank is of the opinion that there is a reason to suspect that the person has:

- engaged in serious misconduct in relation to a RFSP;
- misled the Central Bank;
- failed to disclose certain required information to the Central Bank;
- failed to comply with an evidentiary notice; or
- been convicted of certain serious criminal offences relevant to the person's honesty and integrity.

3. Other key reforms and clarifications

Suspension notices

Under the existing fitness and probity regime the Central Bank has the power to issue a suspension notice suspending an individual who is subject to an investigation of their fitness and probity from performing all or part of one or more CF or PCF roles for a period of three months. The Central Bank has the power to apply to the High Court for an order extending the period of validity of a suspension notice for an additional period of up to three months.

Under the enhanced fitness and probity regime:

- the duration of a suspension notice issued by the Central Bank to an individual who is subject to a fitness and probity investigation will be increased from three months to six months.
- A mechanism will be introduced to allow a person who is subject to a suspension notice to appeal the suspension notice to the High Court.
- The period by which the High Court may extend the duration of a suspension notice upon application by the Central Bank will be extended from an additional three months to an additional twenty-four months (bringing the maximum total duration of a suspension notice to thirty months).

Prohibition notices and orders

Under the existing fitness and probity regime, the Central Bank has the power to issue a prohibition notice preventing a person found not to be fit and proper from performing a CF or PCF role or restricting them in the performance of some or all such roles, either for a specified period or indefinitely. The Central Bank may apply to the High Court for an order directing a person to comply with the prohibition notice.

Under the reformed fitness and probity regime, a mechanism will be established to enable the Central Bank or an individual who is prohibited by the Central Bank (as confirmed by an order of the High Court) to apply to the High Court for a discontinuance or variation of the prohibition notice.

Information gathering

The enhanced fitness and probity regime will extend the Information gathering powers of the Central Bank to cover a situation where a firm that is proposing an individual for a PCF role is itself in the process of applying for regulatory authorisation and is not yet regulated by the Central Bank.

Financial holding companies

The enhanced fitness and probity regime will be extended to directors and relevant staff of financial holding companies established in Ireland.

European Central Bank (ECB) competence

The revised regime will clarify that the ECB has competence for the PCF assessment of individuals proposed for appointment to key function holder positions in significant institutions (a list of which is maintained by the ECB).

KEY DATES

Date	Milestone
July 2021	General Scheme of Bill published.
Mid-2022 at the earliest	Subject to the legislative process, Central Bank consultation expected to be launched.
Early 2023 at the earliest	Individual accountability regime expected to come into effect.

ACTIONS

1	CONDUCT A FITNESS AND PROBITY GAP ANALYSIS	Review fitness and probity policies, procedures and practices and conduct an initial gap analysis against the proposed fitness and probity reforms and the Central Bank's expectations as communicated in recent Dear CEO letters.
2	REVIEW EMPLOYMENT CONTRACTS	Review the employment contractual framework and HR policies to identify amendments needed to adequately cater for fitness and probity.
3	REVIEW APPRAISALS PROCEDURES	Put appropriate structures around performance appraisals to take account of enhanced obligations of RFSPs including as to reporting to the Central Bank.
4	REVIEW D&O POLICIES AND DOCUMENT RETENTION	Consider D&O insurance run off cover, file access and document retention periods in respect of persons who perform or previously performed CF or PCF roles in the firm.

CONCLUSION

Many of our clients have been taking steps for some time to prepare for fitness and probity reforms coming into effect as part of the individual accountability regime. If you require assistance in preparing for individual accountability please contact any member of our financial regulation team.

CONTACT US

For more information, please contact any member of the Financial Regulation Unit listed below or your usual William Fry contact



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